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IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

No. 1306

WILLIAM V. HELD,
Petitioner,

vs.

UNITED STATES OF AMERICA and JOE M. WILSON,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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IN THE
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No.

WILLIAM V. HELD,

Petitioner,

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UNITED STATES OF AMERICA
and JOE M. WILSON,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

WILLIAM V. HELD, your petitioner, prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Sixth Circuit, entered in this proceeding on December 17, 1970.

In addition to your petitioner, sixteen corporations were named initially as respondents in the action filed in the District Court. These corporations were joined with petitioner as appellants and are identified in the caption below. (App. 1a) Following a limited remand to the District Court, and upon motion of the Government, MELVIN A. YOUNG and CHADBOURN TENNESSEE INDUSTRIES, INC. were joined as additional parties respondent.

The District Court order enforcing the IRS summons in question was directed solely against petitioner as an individual; it did not direct compliance by any of corporations named as respondents in the District Court. Nevertheless, all of the respondents are believed to retain an interest in this proceeding and may be deemed parties in this Court under the provisions of Rule 21(6).

OPINIONS BELOW

The opinion of the Court of Appeals has not yet been reported officially. It is printed in the appendix to this petition, at pp. 1a-16a.

The Findings of Fact and Conclusions of Law of the District Court are reported at 315 F. Supp. 352. They were attached to the opinion of the Court of Appeals as Appendix A, and are printed in the appendix to this petition, at pp. 8a-16a.

JURISDICTION

The judgment of the Court of Appeals for the Sixth Circuit was entered on December 17, 1970. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

1. Whether an order enforcing an Internal Revenue Service summons, calling for the production of the records of sixteen corporations, is valid where the summons was directed to an individual taxpayer personal-

ly, without describing his relationship or connection with any of the corporations, and where there was no showing that the taxpayer had any official duty to comply with the summons.

2. Whether an order to produce records, which was premised upon a conclusory, alternative finding that the taxpayer either has custody and control or has knowledge concerning the existence, nonexistence, or whereabouts of the records demanded by a summons, may be enforced without violating the taxpayer's privilege against self-incrimination or unlawfully subjecting him to a contempt citation for unexplained nonproduction of records.

3. Whether the order enforcing the IRS summons for the records of sixteen corporations was supported by adequate findings regarding the existence of records and the recipient's duty and ability to produce the records. (The underlying legal issue concerning the requisite burden of proof, and the factual aspects of the instant case, will be argued in the event that the petition for certiorari is granted.)

4. Whether an IRS summons, directed to a taxpayer who is the target of a criminal investigation, may be issued and enforced without a showing which satisfies the "probable cause" requirement of the Fourth Amendment. (This question, which was not raised in *Donaldson v. United States*, No. 65, decided January 25, 1971, is reserved pending action on the petition for certiorari in *Kyriaco v. United States*, No. 448, October Term, 1970).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

United States Constitution, Fourth Amendment:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

United States Constitution, Fifth Amendment:

> No person ... shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; ...

United States Code, Title 26:

> § 7602. *Examination of Books and Witnesses.* For the purpose of ascertaining the correctness of any return, making a return where none has been made, determining the liability of any person for any internal revenue tax or the liability at law or in equity of any transferee or fiduciary of any person in respect of any internal revenue tax, or collecting any such liability, the Secretary or his delegate is authorized —
>
> (1) To examine any books, papers, records, or other data which may be relevant or material to such inquiry;

(2) To summon the person liable for tax or required to perform the act, or any officer or employee of such person, or any person having possession, custody, or care of books of account containing entries relating to the business of the person liable for tax or required to perform the act, or any other person the Secretary or his delegate may deem proper, to appear before the Secretary or his delegate at a time and place named in the summons and to produce such books, papers, records, or other data, and to give such testimony, under oath, as may be relevant or material to such inquiry; and

(3) To take such testimony of the person concerned, under oath, as may be relevant or material to such inquiry.

STATEMENT OF THE CASE

The petitioner, William V. Held, is an individual who is the target of a criminal investigation by the IRS Intelligence Division. On August 21, 1969, Special Agent Wilson issued a summons to petitioner, hereinafter referred to as "Held". The summons called for the production of "all corporate books and records" of sixteen entities, mostly for the years 1965 through 1968.

The summons was addressed simply to "William V. Held, Chattanooga, Tennessee", and did not set forth or describe in any way his alleged connection with, or relationship to, any of the corporations. On the re-

turn date, compliance with the summons was refused for the reasons set forth in the District Court's opinion. (App. 10a-11a)

The special agent petitioned the United States District Court for the Eastern District of Tennessee for an order enforcing the summons. Answers contesting enforcement were filed by Held and the entities named in the summons. Held denied that the summons had been issued for a lawful purpose; denied that he was in possession and control of the books and records; and denied that he had been summoned, or that he had appeared, as custodian of any books and records. Held also asserted his constitutional rights under the Fourth and Fifth Amendments and raised other defenses to enforcement of the summons. (App. 10a-11a)

Following an evidentiary hearing, the District Court granted enforcement of the summons without modification. With respect to the contested issues of duty and ability to comply with the summons, the District Court made the following conclusory findings: (App. 12a)

> Although it is contended by the defendant Held that he is not the authorized custodian of the books and records sought in the summons and that he does not have custody of certain unspecified portions of the records or that they are not in existence, there is no evidence in the record in support of this contention. The defendant Held did not testify in this case. To the contrary, there is evidence that the defendant Held controlled or directed the keeping of the records on behalf of each of the defendant

> corporations and that he either has control or custody of such records or otherwise has or should have knowledge of the whereabouts of such records or of their existence or non existence, if in fact any records sought are non existent. The Court accordingly finds that the defendant Held either has control and custody of the corporate records sought in the summons or has knowledge of their existence or non existence and of their whereabouts if in existence. • • •

The order enforcing the summons directed Held to appear for the purpose of producing the records demanded and to give testimony concerning the tax liability and correctness of the income tax returns in question.

In the District Court, Special Agent Wilson testified pursuant to a discovery deposition and he was called as witness by the Government at the hearing in the District Court. Wilson denied that he was required to know what records were in existence before issuing a summons and he testified that the "prime purpose of the summons" was to "identify what records are in existence". (Tr. 3/13/70, pp. 48-49) Regarding the actual existence of records, Wilson testified: "I don't know whether they exist or not." (Dep. 2/20/70, p. 108) His sole basis for believing that the records existed was that they were records "normally kept" by corporations. (Dep. 108) Wilson also testified that some of the entities in the summons issued to Held "simply represent bank accounts which we have located".

(Dep. 78) He testified that Held was believed to be "at least a part owner" of the entities, but that he did "not know whether that relationship existed as of the date of the summons". (Dep. 165) Wilson had a "strong suspicion", however, that Held controlled the corporations. (Dep. 168)

Melvin A. Young, an accountant, testified at the initial hearing in the District Court that Held no longer had any connection with various corporations whose records had been summoned. (Tr. 250) Evidence adduced on limited remand from the Court of Appeals established that five of the respondent corporations in the summons enforcement proceeding are now wholly owned by a subsidiary of Chadbourn Inc., a widely held, listed corporation; and that Melvin A. Young now has possession of the records of said five corporations as agent for Chadbourn.

Most of the evidence in the record relates to the five corporations controlled by Chadbourn Inc., and much of this evidence was adduced following the limited remand by the Court of Appeals. The record shows, however, that the charters of five other corporations had been revoked by the State of Tennessee on various dates before and after issuance of the summons, including one revocation in 1957. (Tr. 204-205; Exs. 29-33)

The Court of Appeals for the Sixth Circuit affirmed the judgment of the District Court. The Court held that the District Court's findings were supported by the record and were not clearly erroneous.

REASONS FOR GRANTING THE WRIT

1. The holding below disregards the teaching of this Court in *Wilson v. United States*, 221 U.S. 361 (1911) and other leading decisions, and it is in conflict with the very recent decision in *October 1969 Grand Jury (Karl Brussel, Witness) v. United States*, ____ F. 2d ____ (7th Cir., No. 17,920, 11/4/70). In contrast to the decision below, *Brussel* holds in essence that a subpoena duces tecum for corporate records must be properly addressed and that there must be an adequate showing of official duty and capacity to warrant the imposition of sanctions for nonproduction of records.

2. The factual context of this case brings into focus the possible conflict between *Curcio v. United States*, 354 U.S. 118 (1957), upholding refusal to testify concerning the whereabouts and existence of corporate records, and cases upholding contempt sanctions for unexplained failure to produce records. See *United States v. Bryan*, 339 U.S. 323 (1950); *McPhaul v. United States*, 364 U.S. 372 (1960). The holdings in the latter cases may not be consistent with the more recent view reflecting the Court's "unwillingness to subject those suspected of crime to the cruel trilemma of self-accusation, perjury or contempt". *Murphy v. Waterfront Commission*, 378 U.S. 52, 55 (1964).

3. The issues raised in this case have wide importance in the administration of the revenue laws and the laws of other investigative agencies, and they are equally important in determining the rights and obligations of persons subpoenaed to produce records be-

fore congressional committees and grand juries. Clarification is needed to protect against the erosion of Fifth Amendment rights by use of the subpoena duces tecum to coerce testimony from witnesses which could not be obtained pursuant to an ordinary subpoena.

ARGUMENT

I. The Holding Below Disregards the Teaching of This Court in Wilson v. United States and Other Leading Decisions and It is in Conflict With a Recent Decision of the Seventh Circuit.

Two early decisions of this Court, decided on the same day, establish that the subpoena for corporate records must be directed either to the corporation or to the officer who is the custodian. *Wilson v. United States*, 221 U.S. 361, 374 (1911); *Dreier v. United States*, 221 U.S. 394, 400 (1911). See Annotation, *Subpoena Duces Tecum — Form — Contents*, 23 A.L.R. 2d 862, 883-885 (1952); 97 C.J.S. *Witnesses* § 25, p. 391 (1957). Subsequent decisions, with one possible exception, have not sanctioned a departure from this requirement.[1]

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[1] *See United States v. White*, 322 U.S. 694 (1944) (subpoena issued to labor union; served on president); *United States v. Fleischman*, 339 U.S. 349 (1950) (subpoena issued to executive board member of organization); *Hills v. United States*, 353 U.S. 308 (1957) (subpoenas addressed to corporation; served on the secretary-treasurer); *Curcio v. United States*, 354 U.S. 118 (1957) (subpoena addressed to, and served upon, the secretary-treasurer of union).

In *McPhaul v. United States*, 364 U.S. 372, 380 (1960), the dissenting opinion of four justices emphasized that the subpoena "did not name petitioner as officer, agent, or member" of the organization.

The decisions of this Court have limited liability for the nonproduction of existing, available corporate records to those officers or agents "who are officially responsible for the conduct of its affairs." *Wilson v. United States*, 221 U.S. 361, 376 (1911). This dictum was quoted with approval in *United States v. Fleischman*, 339 U.S. 349, 356-357 (1950), where the Court held that the requisite duty[2] may be imposed by serving a subpoena addressed to an individual "in her official capacity as a member of the executive board". (339 U.S. at 353, n. 4).

In *United States v. White*, 322 U.S. 694, 695-696 (1944), the Court observed that the recipient of the subpoena "had not been subpoenaed personally to testify nor personally directed by the subpoena duces tecum to produce the union's records." This caveat was painstakingly repeated in *Curcio v. United States*, 354 U.S. 118, 123-124 (1957), where the Court stressed that the custodian's duty to produce stems from the obligation he undertakes "by assuming the duties of his office".

The Internal Revenue Service summons issued to this petitioner does not meet the tests of enforceability prescribed by *Wilson*, *White*, and *Curcio*, *supra*. In contrast to those cases, the subpoena here was directed

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[2]The opinion in *Fleischman*, 339 U.S. at 353, n. 4, suggests that an improperly addressed subpoena would not meet the "due process" requirement that an individual be clearly notified of the duty imposed by the subpoena. Such a subpoena, moreover, may not be consonant with the particularity requirement of the Fourth Amendment. The "self-incrimination" implications are discussed in the text of this petition.

to petitioner personally. It was not issued to any corporation, nor was it directed to petitioner as an officer, agent or employee of any corporation. The subpoena did not recite or describe petitioner's relationship or connection with any corporation under investigation, and no attempt was made to establish the relationship in the District Court proceeding. Significantly, the order entered by the District Court was directed solely to petitioner and did not direct compliance by any of the corporations.

Although the facts differ, the holding below is in conflict with the reasoning and result in *October 1969 Grand Jury (Karl Brussel, Witness) v. United States*, ____ F. 2d ____ (7th Cir., No. 17,980, 11/4/70). In *Brussel*, as in the instant case, the witness contended on appeal that "there was not enough evidence . . . of his relationship to the corporations nor his capacity to produce the described documents to warrant a finding that he had the duty or ability to produce them." (Slip Opinion, p. 4) The contempt order was reversed for "insufficiency of proof" of official responsibility to comply, even though one subpoena was directed to "Brussell & Brussell, Inc., or any authorized agent" and the other was directed to "Karl Brussel, President, or any authorized agent" of Cybertype Corporation. The Seventh Circuit distinguished *McPhaul v. United States*, 364 U.S. 372 (1960), for reasons similar to those advanced in petitioner's reply brief in the court below.

Clearly, *Brussel* supports petitioner's contentions that a subpoena for corporate records must be prop-

erly addressed and that there must be a showing of corporate capacity or agency to justify an order enforcing the subpoena. Petitioner submits, moreover, that enforcement of the summons directed to petitioner personally would not meet the implicit requirement of *United States v. Kordel*, 397 U.S. 1, 8 (1970), that a procedure be employed which would oblige "the corporation to 'appoint an agent who could, without fear of self-incrimination, furnish such requested information as was available to the corporation.'"

Although *Kordel* was concerned with answers to interrogatories, the same principle should apply to the issuance of a subpoena duces tecum. See 8 Wigmore, *Evidence* § 2200, p. 131 (McNaughton rev. 1961), suggesting that the courts should sanction "a form of process ... which will obtain the corporation books without involving process against the custodian agent of the corporation." This interpretation of *Kordel* is consistent with, if not required by, the decisions of this Court which implicitly hold that a subpoena duces tecum for corporate records must be addressed properly to foreclose exercise of the privilege against self-incrimination and which have premised the holder's duty to comply upon the representative capacity in which the records are held. *Wilson v. United States*, 221 U.S. 361, 382 (1911); *Essgee Company v. United States*, 262 U.S. 151, 158 (1923); *United States v. White*, 322 U.S. 694, 695-696, 699 (1944); *Curcio v. United States*, 354 U.S. 118, 123-124 (1957). In *Brussel v. United States*, 396 U.S. 1229, 1230-1231 (1969), the Opinion in Chambers of Justice Marshall states that "the rule permitting compelled production of corporate records by their custodian may be invoked only against a

party who is in fact the custodian of the records."

The importance of safeguarding the constitutional rights of individuals subjected to the administrative or judicial subpoena duces tecum makes it imperative that the Court specifically confirm or reject the teaching of the cited cases. It has been aptly stated that the subpoena power must be kept "within well-defined channels" because of its "drastic nature" and the possibilities of severe mischief inherent in its use." *Endicott Johnson Corp. v. Perkins*, 317 U.S. 501, 512 (1943), Murphy, J., dissenting. Unless the holding below is reversed, the door will be open to indiscriminate use of the summons power by the IRS and uncertainty will be injected into an area where the rules have been both clear and stringent.[8]

II. The District Court's Alternative "Finding" — that Petitioner Either Has Custody and Control or Has Knowledge of the Existence, Nonexistence, or Whereabouts of the Records — Will Subject Petitioner to the Impermissible Dilemma of Self-incrimination or Contempt for Nonproduction of Records.

Apart from the failure to show that petitioner had any duty or official responsibility to comply with the

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[8] By way of example, petitioner's brief below cited twelve actions in which the IRS summons had been directed to a specified officer of the corporation and the subsequent enforcement action was brought against the individual in his representative capacity. See, e.g., *United States v. Earl L. Erdner, as President of Earl L. Erdner, Inc.*, 422 F. 2d 835 (2d Cir. 1970).

Curiously, in *United States v. Wozniak*, 301 F. 2d 764, 766 (6th Cir. 1967), the opinion states that it was not contested that the "office manager and treasurer" was the "proper person upon whom to make service for the production of the records".

IRS summons, there was insufficient proof that petitioner had failed to produce records which "are in existence and within his control." *Nilva v. United States*, 352 U.S. 385, 392 (1957). The District Court made no explicit finding that petitioner had failed to produce records in existence which were in his possession, custody, or control. Instead of making specific findings, the trial court merely made an alternative, conclusory "finding" that petitioner "either has control and custody of the corporate records sought in the summons or has knowledge of their existence or non existence and of their whereabouts if in existence." (App. 12a)

The plain import of the District Court's holding is that petitioner will be obliged to testify or be punished for contempt. It is difficult to imagine how petitioner could extricate himself from a contempt conviction without explaining the existence or nonexistence of records, his knowledge as to the location or whereabouts of records in existence, and his relationship, if any, to each of the corporations. Such testimony clearly would be incriminating. See *Curcio v. United States*, 354 U.S. 118 (1957) (upholding the custodian's refusal to testify concerning the existence and whereabouts of corporate records); *October 1969 Grand Jury (Karl Brussel, Witness) v. United States*, ____ F. 2d ____ (7th Cir., No. 17,900, 11/4/70) (holding that Brussel could refuse to answer questions concerning his relationship to two corporations).

It is not a sufficient answer, as the court below assumed, that the District Court might uphold objections to testimony based upon the privilege against self-incrimination. The claim of privilege will not protect petitioner from being "proceeded against for his failure to produce the records demanded by the subpoena duces tecum." *Curcio v. United States*, 354 U.S. 118, 127, n. 7 (1957). Moreover, in the instant case "the mere act of producing" some records, and the failure to produce all of the records demanded, would be incriminating and would tend to establish an incriminating relationship to the corporations. *See Communist Party of United States v. United States*, 331 F. 2d 807, 812-813 (D.C. Cir. 1963), distinguishing *Wilson* and *White*, *supra*, on the ground that "in those cases ... the mere act of producing the records was not incriminating", and concluding that the decisions "furnish no authority for compelling an officer to identify himself as such where ... such identification, without more, incriminates him."

In *Murphy v. Waterfront Commission*, 378 U.S. 52, 55 (1964), this Court held that the privilege against self-incrimination reflects an "unwillingness to subject those suspected of crime to the cruel trilemma of self-accusation, perjury or contempt". Here, the District Court's order will subject petitioner to the dilemma denounced in *Murphy*, and petitioner will be obliged to "choose his own brand of hemlock." *Traub v. United States*, 232 F. 2d 43, 48 (D.C. Cir. 1955). Petitioner submits that the order is clearly erroneous and that he should not be subjected to the undue

hardship of a contempt conviction as a prerequisite to obtaining full appellate review.[4]

Significantly, the decisions of this Court reviewing contempt convictions for failure to produce records demanded by a subpoena duces tecum have produced sharply divided opinions relative to the burden of establishing the existence of records and the requisite custody or control. The Opinion in Chambers of Justice Marshall in *Brussel v. United States*, 396 U.S. 1229, 1230-1231 (1969), tacitly recognizes the possible conflict between *Curcio*, which upholds refusal to testify concerning the whereabouts and existence of corporate records, and cases holding that contempt sanctions may be predicated upon unexplained failure to produce records. See *McPhaul v. United States*, 364 U.S. 372 (1960); *United States v. Bryan*, 339 U.S. 323 (1950); *United States v. Fleischman*, 339 U.S. 349 (1950). Justice Marshall did not find it fatal that Brussel, unlike Curcio, had been "cited for failure to produce the subpoenaed records, as well as for failure to testify." (396 U.S. at 1230)

This case suggests the need for clarification of the holdings in *Bryan*, *Curcio*, and *McPhaul*, *supra*. Unless clarification is forthcoming, there is great danger

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[4]See *United States v. Hemphill*, 369 F. 2d 539, 543 (4th Cir. 1966). An order enforcing an IRS summons presupposes an ability to comply and should not be entered unless the evidence is of sufficient character to justify an attachment for criminal contempt. *Wall v. Lowder*, 185 F. Supp. 654, 658-659 (M.D. N.Car. 1960). This, too, may be implicit from the opinion in *Reisman v. Caplin*, 375 U.S. 440, 450 (1964), which holds that there must be "full opportunity for judicial review before any coercive sanctions may be imposed."

that administrative and judicial subpoenas duces tecum will be used to coerce testimony which could not be obtained from the witness pursuant to an ordinary subpoena, thereby curtailing the protection afforded by the Fifth Amendment.

CONCLUSION

For the foregoing reasons, a writ of certiorari should issue to review the judgment and opinion of the Court of Appeals for the Sixth Circuit.

Respectfully submitted,

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APPENDIX

No. 20672

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

UNITED STATES OF AMERICA and JOE M. WILSON, Special Agent, Internal Revenue Service,
Plaintiffs-Appellees,

v.

WILLIAM V. HELD; ETOWAH INDUSTRIES, INC.; BRAINERD LTD., INC.; DECATUR MANUFACTURING CO., INC.; DECHERD FACTORY TO YOU STORE, INC.; EAST TENNESSEE CONSTRUCTION CO., INC.; 5770 CORPORATION; MOBY DICK SPORTSWEAR, INC. (Madisonville, Tenn.); MOBY DICK SPORTSWEAR, INC. (New York); QUALITY APPAREL CORPORATION; ROBINHOOD INDUSTRIES, INC.; TELLICO MANUFACTURING CO., INC.; WAYNE INDUSTRIES, INC.; HERCULES SPORTSWEAR, INC.; WINCHESTER SPORTSWEAR CO., INC.; CONTINENTAL SPORTSWEAR, INC.; and WILMART ASSOCIATES, INC.,
Defendants-Appellants.

APPEAL from the United States District Court for the Eastern District of Tennessee, Southern Division.

Decided and Filed December 17, 1970.

Before PHILLIPS, Chief Judge, and EDWARDS and BROOKS, Circuit Judges.

PHILLIPS, Chief Judge.

This is an appeal from an order of the District Court enforcing an Internal Revenue Service summons issued under the authority of § 7602 of the Internal Revenue Code of 1954, 26 U.S.C. § 7602.

The summons was issued to William V. Held by a special agent of the Internal Revenue Service. It directed Held to produce specified records of sixteen named corporations and to testify with respect thereto. Held appeared on the return date but produced no records and refused to testify. To compel compliance with the summons, the United States and Special Agent Wilson initiated this enforcement action in the District Court, naming Held and the sixteen corporations as defendants.

Another prong of this investigation is discussed in *United States v. Artmen, et al.*, — F 2d — (6th Cir. Nos. 20357, 20358), in which the opinion is issued contemporaneously with the release of the opinion in the present case.

The enforcement action was tried before District Judge Frank W. Wilson, sitting without a jury. Judge Wilson entered an order enforcing the summons, supported by detailed findings of fact and conclusions of law which are attached as Appendix A to this opinion. On motion of Held and the respondent corporations, this Court stayed the execution of the enforcement order pending the hearing and disposition of the appeal. The case was advanced on the calendar of this Court and heard on October 15, 1970.

We affirm.

In July 1967, Held's tax return for 1965 was assigned to a revenue agent of the Internal Revenue Service for audit. By April 1968, the revenue agent's investigation indicated probable ties between Held and all or at least some of the respondent corporations. The agent considered these suspected ties to have possible criminal ramifications in addition to civil tax liability consequences. The revenue agent thereupon filed

a referral report with the Intelligence Division of the Internal Revenue Service recommending an investigation for possible tax fraud. A special agent from the Intelligence Division was assigned to the investigation.

Beginning in June 1968, the special agent and a revenue agent began a comprehensive investigation in the area of Chattanooga, Tennessee of all connections between Held and the respondent corporations. The agents inspected all corporate records available to them and checked all corporate bank accounts they could locate. By August 1969, the investigation indicated that Held was in effective control of all the respondent corporations, but that he had not permitted his name to be reflected as a corporate officer of record. The investigation further indicated to the satisfaction of the agents that Held controlled the bank accounts and other financial affairs of the corporations. Thereupon the special agent issued the § 7602 summons.

For a more complete recitation of the facts reference may be made to the findings of fact and conclusions of law of the District Judge, Appendix A hereto.

Appellants challenge the validity of certain findings of the District Court. It is argued that the record does not support the findings that the requested corporate records are in existence and that Held has the power to produce them. It is not disputed that all records sought under the summons are of the type customarily kept by corporations. We hold that these findings of the District Court are supported by the record and are not clearly erroneous. Fed. R. Civ. P. 52(a).

The three principal questions raised on this appeal are: (1) whether a summons issued for the dual purpose of ascertaining both the civil tax liability and the presence of criminal tax fraud, if any, on the part of a taxpayer is authorized under § 7602; (2) whether a § 7602 summons directing the production of corporate records by the person in control of them is enforceable when addressed only to such person without specifying his relationship to the corporation; and (3) whether

the order of the District Court enforcing the § 7602 summons violates Held's Fifth Amendment privilege against self-incrimination.

(1) Dual Purpose of the Summons

The facts as they existed on the date of the issuance of the summons are the facts under which the validity of the summons is to be tested. *United States* v. *Giordano*, 419 F 2d 564, 568 (8th Cir.), cert. denied 397 U.S. 1037; *In re Magnus, Mabee and Reynard, Inc.*, 311 F 2d 12, 16 (2nd Cir.), cert. denied, 373 U.S. 902.

The District Court found as a fact that the summons was issued at least in part to determine the civil tax liability of the respondent corporations. It is obvious that the requested records might also be helpful in the investigation of possible tax fraud. The District Court did not determine the primary purpose for which the summons was issued and we find it unnecessary to make such a determination in disposing of this issue. Even if the primary purpose of the summons was to further the criminal tax investigation, we believe the secondary purpose of determining appellant's civil tax liability would support the validity of the summons. See *United States* v. *Michigan Bell Tel. Co.*, 415 F 2d 1284, 1286 (6th Cir.).

In *United States* v. *Powell*, 379 U. S. 48, 57-58, the Supreme Court set out the requirements for the enforcement of a § 7602 summons as follows:

> "[T]hat the investigation will be conducted pursuant to a legitimate purpose, that the inquiry may be relevant to the purpose, that the information sought is not already within the Commissioner's possession, and that the administrative steps required by the Code have been followed . . ."

Section 7602 expressly provides the summons may be issued:

> "For the purpose of ascertaining the correctness of any return, making a return where none has been made, de-

> termining the liability of any person for any internal revenue tax . . ., or collecting any such liability, . . ."

The purpose of determining the civil tax liability of the respondent corporations is without question a valid and proper purpose for the issuance and enforcement of the § 7602 summons served on Held.

Appellants contend that the fact that the summons will also further the criminal tax investigation vitiates its authorized purpose. This contention is not novel, and so far as we are able to find, all existing precedent supports the conclusion of the District Court. It is well settled that a § 7602 summons issued for an authorized purpose is entitled to enforcement even though it may produce evidence of criminal conduct on the part of the taxpayer. *United States* v. *Fruchtman*, 421 F 2d 1019, 1022 (6th Cir.); *United States* v. *Roundtree*, 420 F 2d 845, 851 (5th Cir.); *United States* v. *Giordano*, supra, 419 F 2d 564, 568 (8th Cir.) cert. denied, 397 U. S. 1037. *United States* v. *Michigan Bell Tel. Co.*, supra, 415 F 2d 1284, 1286, (6th Cir.); *DiPiazza* v. *United States*, 415 F 2d 99, 103, (6th Cir.); *United States* v. *DeGrosa*, 405 F 2d 926, 928 (3rd Cir.); *Lash* v. *Nighosian*, 273 F 2d 185, 188, (1st Cir.), cert. denied, 362 U. S. 904. See also *United States* v. *Powell*, supra, 379 U. S. 48; *Ryan* v. *United States*, 379 U. S. 61, aff'g 320 F 2d 500 (6th Cir.).

Enforcement of the summons is not precluded by the possibility that it eventually might lead to a criminal prosecution.

It is to be noted that no criminal charges of any type relating to the matters under investigation by the Internal Revenue Service are presently pending against the appellants. The special agent deposed that no conclusion as to the existence of fraud had been reached in this case.

(2) The Address of the Summons

The summons was addressed to William V. Held. Appellants contend that the summons is unenforceable because the

relationship of Held to the corporation whose books he was directed to produce was not specified in the address of the summons. We find this contention to be without merit.

The District Court made a finding that Held either had custody of the requested records or had control over them at the time the summons was issued.

The Government does not undertake to label the relationship of Held to the corporations, presumably because the investigation revealed Held to be in control of the corporations without occupying an official position. We hold that a taxpayer who is in control of a corporation cannot shield himself from a § 7602 summons by refusing to accept an official position with the corporation.

Section 7602 expressly authorizes the Secretary of the Treasury or his delegate:

> "(2) *To summon* the person liable for tax or required to perform the act, or any officer or employee of such person, or *any person having possession, custody, or care of books* of account containing entries relating to the business of the person liable for tax or required to perform the act, or any other person the Secretary or his delegate may deem proper, to appear before the Secretary or his delegate at a time and place named in the summons and to produce such books, papers, records, or other data, and to give such testimony, under oath, as may be relevant or material to such inquiry; and . . ." (Emphasis added)

We conclude that a summons addressed to William V. Held directing the production of specified corporate records which were in his custody or under his control is addressed in accordance with the provisions of the statute.

(3) The Fifth Amendment Issue

Appellants, and Held in particular, contend that the enforcement of the summons would violate Held's Fifth Amendment privilege against self-incrimination. Held was ordered by the District Court to produce specified corporate records

and to testify concerning the tax liabilities and the correctness of the income tax returns of the respondent corporations.

With regard to the corporate records, it is well settled that a custodian of such records, or an officer of the corporation, may not refuse to produce corporate records on Fifth Amendment grounds. *United States* v. *Kordel*, 397 U.S. 1, 7; *George Campbell Painting Corporation* v. *Reid*, 392 U.S. 286, 288-89; *United States* v. *White*, 322 U.S. 694; *Essgee Co.* v. *United States*, 262 U.S. 151, 158; *Wilson* v. *United States*, 221 U.S. 361, 377-86.

With regard to the testimony of Held, we do not interpret the District Court's opinion as a predetermination of whether Held will be required to answer any particular question that might be asked of him. We construe the District Court's order to require Held to appear and to answer all questions relevant to the inquiry to which he raises no valid claim of self-incrimination.

Neither the District Court nor this Court can know what questions will be asked of Held pursuant to the summons, or whether Held will refuse to answer any or all questions propounded to him.

Questions that in no way could be incriminating to Held and questions "auxiliary to the production" of corporate records will not give rise to the Fifth Amendment privilege. *Curcio* v. *United States*, 354 U.S. 118, 125, citing *United States* v. *Austin-Bagley Corp.*, 31 F 2d 229, 233-34 (5th Cir.).

Not until questions have been propounded and objection made can a claim of Fifth Amendment privilege be determined. *United States* v. *Terry*, 362 F 2d 914, 917 (6th Cir.), cert. denied, 385 U.S. 1029; *United States* v. *Harmon*, 339 F. 2d 354, 359 (6th Cir.), cert. denied, 380 U.S. 944; *United States* v. *Roundtree*, supra, 420 F 2d 845, 852 (5th Cir.).

We conclude that no violation of Fifth Amendment rights is established at the present stage of this proceeding.

(4) Other Issues

Two other questions raised by the appellants require only brief comment. For the reasons set forth in the findings of the District Court, we agree that the summons did not call for a second inspection in violation of 26 U.S.C. § 7605 (b). Further, we find no abuse of discretion by the District Court in denying appellants access to selected information contained in the initial referral report of the revenue agent to the Intelligence Division. The report was produced for *in camera* inspection by the District Court. All information contained therein was given to appellants except the tentative statement of additional taxable income, the schedule of specific items of omitted income, and information indicating intent to defraud.

All other contentions asserted by appellants have been considered and found to be without merit.

The stay order heretofore issued is dissolved. The judgment of the District Court is affirmed.

APPENDIX A

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This is an action seeking judicial enforcement of a summons issued by a special agent of the Internal Revenue Service in furtherance of an income tax investigation. The lawsuit was initiated by the United States and Internal Revenue Service Special Agent Joe M. Wilson against the defendants, William V. Held and 16 named corporations. After the case had proceeded to issue, the Government filed a motion for summary judgment. The Court reserved a ruling upon the Government's motion for summary judgment and ordered the case to proceed to trial when it appeared that the defendants would not have an adequate opportunity to respond to the issues raised in the motion for summary judgment prior to the

scheduled date of the trial. The case came on for trial before the Court sitting without a jury upon March 13, 1970. The Court now enters the following findings of fact and conclusions of law on the basis of the full record in the case.

Findings of Fact

(1) During the year 1967 the income tax return filed by William V. Held and wife for 1964, together with the corporation income tax return filed by Wilmart Associates, Inc., a corporation in which the defendant Held was a principal, were assigned to a revenue agent (Esslinger) for audit. It appears that the audit was undertaken in the normal course of such matters. In the course of the investigation made in connection with the audit, the investigation broadened to include the additional corporate defendants herein and in which it appeared that the defendant Held may have been an officer, director or principal, including Etowah Industries, Inc. On the basis of the information developed in the course of the audit of the tax returns of the defendant corporation, Etowah Industries, Inc., the revenue agent came across matters which caused him to submit a referral report to appropriate authorities within the Internal Revenue Service recommending further investigation of possible fraud by the Intelligence Division of the Internal Revenue Service. The referral was made accordingly and further investigation was then assigned unto Special Agent Joe M. Wilson, the petitioning agent herein.

(2) The petitioner, Joe M. Wilson, is a duly commissioned special agent of the Intelligence Division of the Internal Revenue Service, assigned to the Nashville, Tennessee, office of that service. As a special agent Mr. Wilson is empowered to issue summonses as a delegate of the Secretary of the Treasury under authority of § 7602 of the Internal Revenue Code of 1954.

(3) Supervision of the tax investigation here involved was first undertaken by Special Agent Wilson in July of 1968.

Thereafter the investigation proceeded as a joint investigation, under the supervision of Special Agent Wilson, but participated in by three revenue agents, Esslinger, Dickey and Swafford. The investigation continued to broaden over the next year until by August of 1969 the investigation involved each of the 16 defendant corporations named as parties defendant to this lawsuit. The investigation had further revealed by this time that the defendant, William V. Held, was the custodian or had supervision over the books and records of each of the 16 defendant corporations. By August of 1969, an extensive investigation had been made in the course of the ever broadening joint tax investigation here involved. However, the investigation had not been completed as to any of the corporate defendants by that time.

(4) On August 22, 1969, as a part of the investigation, Special Agent Wilson issued and served an Internal Revenue summons upon the defendant, William V. Held, as custodian of the books and records of the 16 defendant corporations, directing that he produce all corporate records of each of the 16 defendant corporations for designated tax years between 1965 and 1968 and further describing the specific corporate records desired for each defendant corporation. Only corporate records were sought. No tax records of the defendant Held were sought by the summons. The summons directed the defendant Held to appear before the special agent on September 23, 1969, at 10:00 A.M. with the corporate records designated in the summons and prepared to testify in regard thereto. For the full details of the summons reference is made to a copy of the summons filed as an exhibit to the original petition herein and filed as Exhibit No. 2 upon the trial. By request of the defendant Held the return date of the summons was delayed until September 30, 1969. Upon that date the defendant appeared but refused to testify or produce the records called for in the summons, stating as reasons for his refusal the following matters which now also constitute the defenses in this lawsuit:

(a) The summons was issued in furtherance of a criminal investigation and not in furtherance of a civil tax investigation and therefore was not within any permissible purpose authorized under § 7602 of the Internal Revenue Code of 1954, the statute under which the summons purported to have been issued.

(b) The defendant Held is not the authorized custodian of the books and records of the corporate defendants. Certain of the defendant corporations are no longer in existence. Not being in possession and control of the books and records of all of the corporate defendants, Held would be unable to produce some of the records requested.

(c) The summons constituted a violation of the rights of the defendant Held to be free from unlawful searches and seizures under the Fourth Amendment and his right not to be required to incriminate himself under the Fifth Amendment.

(d) The summons was so burdensome as to constitute a violation of the defendant corporations' right to be free from unreasonable searches under the Fourth Amendment.

(e) The summons constituted an unnecessary second examination of the defendants' books and records, contrary to the provisions of § 7605 (b) of the Internal Revenue Code of 1954.

(5) It is clear that the purpose for which the books, records and testimony was sought in the summons which is the subject of this lawsuit is at least in part in furtherance of an audit of the records of each corporate defendant to ascertain the correctness of the tax returns of that corporation and to determine the correct tax liability of that corporation. At the time the summons was issued and at the present time there is no criminal tax prosecution pending against either the defendant Held individually or against any corporate defendant. Whether there will ever be such a criminal prosecution is entirely problematical at this stage of the investigation. The

ultimate result of the investigation may turn out to be solely a matter of civil tax in significance. Although it is clear that the principal function and duties of the special agent issuing the summons is to investigate fraud and enforce the criminal provisions of the tax laws, his investigations are not irrelevant to a determination of the civil tax liability. Furthermore, the record clearly indicates that the investigation here is a joint investigation, participated in by both the special agent and three revenue agents, the function of the revenue agents being to determine the correctness of the tax returns and the extent of the civil tax liability of each defendant.

(6) Although it is contended by the defendant Held that he is not the authorized custodian of the books and records sought in the summons and that he does not have custody of certain unspecified portions of the records or that they are not in existence, there is no evidence in the record in support of this contention. The defendant Held did not testify in this case. To the contrary, there is evidence that the defendant Held controlled or directed the keeping of the records on behalf of each of the defendant corporations and that he either has control or custody of such records or otherwise has or should have knowledge of the whereabouts of such records or of their existence or non existence, if in fact any records sought are non existent. The Court accordingly finds that the defendant Held either has control and custody of the corporate records sought in the summons or has knowledge of their existence or non existence and of their whereabouts if in existence. It further clearly appears that the records sought are each relevant and material to a determination of the correctness of the corporate tax returns here being audited and to a determination of the civil tax liability of each corporate defendant under investigation.

(7) The corporate records sought in the summons do not constitute in any instance an unnecessary examination or a second examination of such records within the meaning of the provisions of § 7605 of the Internal Revenue Code of 1954.

The record upon the trial in this case reflects that there has been no completion of the investigation with reference to any of the 16 corporate defendants whose records are now sought and that the records now sought in the summons do not constitute a duplication of the examinations heretofore made except where such duplication is necessary to a completion of the audit being performed. The status of the investigation with reference to each corporate defendant remains a continuing investigation. The defendants have sought in great detail to establish the hours and extent of investigation devoted to each corporate defendant by agents of the Internal Revenue Service and in support of the defendants' contention that this is a second examination. Additionally, certain witnesses for the defendant have expressed the opinion that a tax audit could be made as to certain of the defendant corporations on the basis of the records previously known to have been examined. However, it is clear to the Court that the tax investigation here being pursued by the Government has never been completed as to any corporate defendant. It is apparent that the size and extent of the investigation thus far and the justification of a government request for further investigation is occasioned by the manner in which the business affairs of the defendants have been conducted, rather than by any duplication of investigative effort. As but one example of the complexity of the tax audit here undertaken, it appears from the testimony that the 16 corporate defendants maintained not less than 80 bank accounts in a number of different banks in many parts of the United States.

(8) In view of the matters just previously stated and in view of the statement of the willingness on the part of the Special Agent issuing the summons to have the records produced under any reasonable schedule at mutually acceptable locations, there would appear to be no unreasonable burden occasioned the defendants in complying with the summons.

Conclusions of Law

(1) The Court has jurisdiction of the parties and of this cause of action pursuant to § 7402(b) and § 7604(a), Title 26 U.S.C.

(2) The summons here sought to be enforced is authorized by the provisions of § 7602 of Title 26 U.S.C. Since the purpose of the summons is in furtherance of a tax investigation that is at least in part a civil tax investigation, and since the investigation here is a joint investigation being participated in both by a special agent and by three revenue agents, the summons would be for an authorized purpose under the foregoing statute. As stated in the case of *United States* v. *Michigan Bell Telephone Company*, (C.A. 6, 1969) 415 F.2d 1284:

> "The government may use a section 7602 summons properly when its investigation may have both civil tax liability and criminal ramifications. (Citations omitted). Even assuming that the district court was correct in its determination that the summons in this case was principally to investigate for criminal liability, the summons was proper since the court did not exclude the possibility that the summons also was to determine civil tax liability. (Citations omitted)"

(3) The summons here sought to be judicially enforced is not invalid as calling for a second inspection of the books and records of any defendant contrary to the provisions of § 7605-(b), Title 26 U.S.C. Since the evidence establishes that the investigation and audit had never terminated or been completed with respect to any of the 16 corporate defendants, enforcement of the summons would not subject any of the defendants to an "unnecessary" examination or investigation within the meaning of § 7605(b).

As stated in the case of *Hinchcliff* v. *Clarke*, (C. A. 6, 1967) 371 F.2d 697:

> "The congressional purpose, as revealed by the language

> of the statute, was not to prohibit all investigation of closed income tax accounts, but to guarantee that taxpayers whose accounts had been closed would not be subject to 'unnecessary' harrassment by being required frequently to present their 'books of account' to the income tax agency."

See also *United States* v. *Giordano*, (U.S.D.C., E.D. Mo. 1969) 301 F.Supp. 84; *United States* v. *Crespo*, (U.S.D.C., Md., 1968) 281 F.Supp. 928.

(4) Since all of the records called for in the summons are corporate records, and no personal records of defendant Held are sought, enforcement of the summons would constitute no violation of either the Fourth or Fifth Amendment rights of the defendant Held. The defendant Held can claim no personal right in corporate records and the ordered production of corporate records would violate no right of the defendant Held to be secure against unreasonable searches. *United States* v. *White*, (1944) 322 U.S. 694. See also *Crespo* v. *United States*, (U.S.D.C., Md., 1968) 281 F.Supp. 928; *Hair Industry, Ltd.* v. *United States*, (C.A. 2, 1965) 340 F.2d 510, cert denied 381 U.S. 950 (1965). It is well settled that the custodian of corporate records may not be permitted to refuse to produce the records on Fifth Amendment grounds even though he might personally be incriminated by their contents. *Wilson* v. *United States*, (1911) 221 U.S. 361; *Hale* v. *Henkel*, (1906) 201 U.S. 43.

(5) In view of the complexity of the tax investigation necessarily arising from the manner the defendants have conducted their businesses and in view of the stated willingness of the special agent issuing the summons to have the records produced under any reasonable schedule at mutually acceptable locations and in view of the relevance and materiality of the records sought to the tax investigation, there would be no unreasonable burden occasioned the defendant in producing the records demanded in the summons. There would accordingly be no violation of any defendant's Fourth Amendment right

to be secure from unreasonable searches by granting enforcement of the summons. *Oklahoma Press Publication Co.* v. *Walling*, 327 U.S. 186, 208-209 (1946); *McGarry* v. *Securities & Exchange Commission*, (C.A. 10, 1945) 147 F.2d 389, 392.

(6) The Court accordingly concludes that enforcement of the summons should be granted in accordance with the prayers in the original petition as filed herein.

An order will enter accordingly.

Frank W. Wilson,
United States District Judge.

In the Supreme Court of the United States

OCTOBER TERM, 1970

No. 1306

WILLIAM V. HELD, PETITIONER

v.

UNITED STATES OF AMERICA, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a–16a) is not yet officially reported. The opinion of the district court (Pet. App. 8a–16a) is reported at 315 F. Supp. 352.

JURISDICTION

The judgment of the court of appeals was entered on December 17, 1970 (Pet. App. 1a). On February 4, 1971, petitioner's application for recall and stay of mandate was denied by Mr. Justice Stewart. The petition for a writ of certiorari was filed on February 4, 1971. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

418 593 71

QUESTIONS PRESENTED

1. Whether a person in effective control of a corporation and having custody of corporate records may refuse to comply with an Internal Revenue summons calling for the production of the records on the ground that he is not formally designated in the summons as an officer of the corporation.

2. Whether the evidence was sufficient to support the district court's finding that petitioner was able to produce at least some of the corporate records named in the Internal Revenue summons.

3. Whether, prior to appearing in response to a summons to produce corporate records and give oral testimony, the witness may invoke the Fifth Amendment privilege against self-incrimination.

STATEMENT

The district court, on application of the United States, enforced an Internal Revenue summons which, as found by the district court (Pet. App. 10a), was issued to and served upon petitioner "as custodian of the books and records of the 16 defendant corporations" whose records were requested in the summons. The underlying tax investigation began as a routine audit by a revenue agent of petitioner's personal tax return of 1964 and the 1967 return of Wilmart Associates, Inc., a corporation of which petitioner was a principal (Pet. App. 9a). During the course of the investigation, which included examination of various bank accounts and fragmentary corporate records in the possession of various accountants, it became apparent that petitioner controlled some 80 bank ac-

counts of the 16 corporations and that, although petitioner was not formally designated as an officer of any of the corporations, he was in effective control of them (Pet. App. 2a–3a, 9a–10a). Accordingly, in 1969 a special agent issued the instant summons.

At the enforcement proceedings in the district court, an accountant testified that petitioner engaged him in 1967 to do audit work and that he thereafter prepared tax returns for petitioner and ten of the corporations here involved (Hearing Transcript for March 13, 1970, pp. 206–208, 250).[1] The same accountant also stated on deposition that petitioner put up the capital for some of the corporations and controlled them "financially" and "generally speaking" (deposition of Melvin Young, January 19, 1970, pp. 26–29). Another accountant employed by petitioner had been told by him that he, petitioner, was the "general manager" of the corporations and had the final "say-so" on corporate matters (deposition of James T. Finney, January 19, 1970, pp. 3, 15, 47, 61, 63).

While the enforcement proceedings were pending, petitioner, without notice to the district court or the United States, consummated a sale of the stock, previously owned or controlled by petitioner, of five of the corporations. While many of the records relating to these corporations were transferred as part of the

[1] By order of the court of appeals, this case was appealed, briefed, and argued on the original record and there is no printed record or appendix. All record references herein are to the original transcript of hearings or depositions.

sale,[3] certain pertinent records of these and other corporations, including pre-1967 records, remained in the control of petitioner or his accountant (Hearing Transcript for September 3, 1970, pp. 53–56, 59, 68, 70–77).

The court of appeals affirmed the district court's enforcement of the summons (Pet. App. 1a–8a), stating (Pet. App. 6a):

> The Government does not undertake to label the relationship of Held to the corporations, presumably because the investigation revealed Held to be in control of the corporations without occupying an official position. We hold that a taxpayer who is in control of a corporation cannot shield himself from a Sec. 7602 summons by refusing to accept an official position with the corporation.

ARGUMENT

1. There is no merit to petitioner's contention (Pet. 10–14) that the Internal Revenue summons for corporate records was wholly invalid because it was addressed to petitioner without naming him as an officer of the corporation. Petitioner's *de facto* position as the person in effective control of the corporations (excepting, of course, the five corporations sold during the enforcement litigation) is clearly established by the voluminous depositions which were taken and by the full evidentiary hearings which were held. As the district court observed (Pet. App. 12a), petitioner did not testify and introduced no evidence to support

[3] Depositions of James DeMatteo, September 2, 1970, pp. 5–7, John J. Speed, August 20, 1970, pp. 13–15, 40, and Special Agent Joe M. Wilson, August 21, 1970, pp. 11, 60–61.

his contention that he was not the authorized custodian and did not have power to produce at least some of the records involved.

Contrary to petitioner's assertion (Pet. 12–13), there is no conflict with the Seventh Circuit's decision in *Brussel* v. *United States*, No. 17990, C.A. 7, decided November 4, 1970. In that case, a civil contempt order was reversed for failure of proof that a defaulting witness was a corporate officer who could produce certain subpoenaed corporate records. In this case, there was a specific finding that petitioner had custody or control of the requested records. In these circumstances, it was not necessary for the government to allege or prove that petitioner held any specific offices with the corporations involved.

2. The record established, contrary to petitioner's contention (Pet. 14–18), that petitioner had the ability to comply with the order enforcing the summons. The evidence summarized above, including that relating to the recent sale by petitioner of five corporations, makes clear that petitioner was, when served with the summons, able to produce many of the records called for in the summons.

3. Finally, as also noted by the court below (Pet. App. 6a–7a), petitioner cannot resist enforcement of the summons on Fifth Amendment grounds. It is well settled that a custodian of corporate records may not refuse to comply with a summons on the ground that the records would incriminate him. See *United States* v. *Kordel*, 397 U.S. 1, 7. And any personal Fifth Amendment claims which might excuse petitioner from answering specific questions may be raised before

the special agent to whom the summons is returnable, but the witness' anticipation of such claims does not excuse him from otherwise complying with a valid summons. Cf. *Communist Party* v. *United States*, 367 U.S. 1, 106–110.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted.

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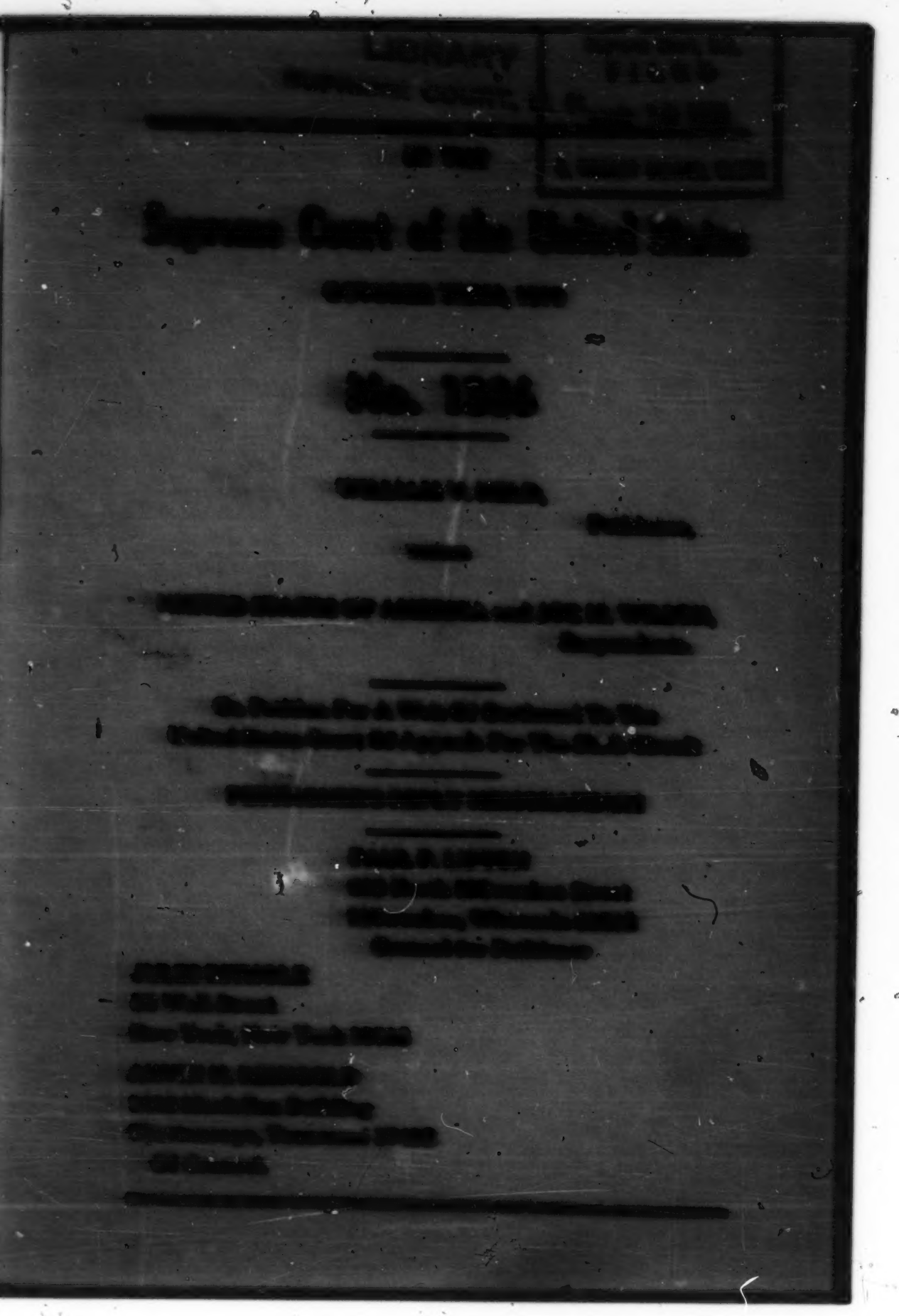

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1970

No. 1306

WILLIAM V. HELD,

Petitioner,

versus

UNITED STATES OF AMERICA and
JOE M. WILSON,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

PETITIONER'S REPLY MEMORANDUM

Respondents' brief (pp. 3, 4 and 5) inexplicably repeats the untrue allegation that petitioner sold five of the corporations during the pendency of the litigation. During the proceedings on limited remand, Government counsel asked that the record be changed to correct the erroneous representation made to the courts below "that Mr. Held sold five corporations" and counsel apologized to the District Court for the "error". (Hearing Transcript, 9/30/70, pp. 3-4)

Actually, the five corporations were wholly owned subsidiaries of Continental Strategics Corporations, a

publicly held corporation which was not a party in the District Court. Petitioner sold all of his stock in Continental in a much publicized transaction on January 29, 1970, and he terminated his relationship with Continental on February 20, 1970. Thereafter, Continental merged with a subsidiary of Chadbourn Inc., a New York stock exchange company. (Speed Deposition, 8/20/70, pp. 4-5, 10, Exs. 1, A-F; Wilson Deposition, 8/21/70, pp. 15-16, Exs. 1-3, 16; De Matteo Deposition, 9/2/70, pp. 4-5, 12-13)

The respondents' brief (p. 3) relies heavily upon two discovery depositions which were not offered or received in evidence in whole or part. The depositions of Melvin A. Young and James T. Finney were not even filed with the District Court until approximately two weeks before oral argument on appeal. They were transmitted to the Court of Appeals as a supplemental record without notice to petitioner, and objection was made to reliance on these depositions in the Court of Appeals. It is, of course, clear that an appellate court may not properly consider a deposition not offered in evidence, even though it was included in the record on appeal. *Worsham v. Duke*, 220 F. 2d 566, 569 (6th Cir. 1955); *United States v. Brookhaven*, 134 F.2d 442, 447 (5th Cir. 1943); 2A Barron & Holtzhoff, *Federal Practice and Procedure* § 654, pp. 169-170 (1961).

The record does not support respondents' contention that petitioner was an individual having a "*de facto* position as the person in effective control" of each of the sixteen corporations. (Brief, p. 4) Indeed, the record contains little evidence relative to many of the

corporations and the bulk of the evidence pertains to the five corporations admittedly not controlled by petitioner.

The summons in question was issued to petitioner solely upon the basis of the special agent's suspicion of financial control. The agent testified that he did not know what relationship existed between petitioner and the corporations at the time the summons was issued. (Pet. 7-8) In any event, respondents cite no case holding that the production of corporate records may be compelled by a subpoena duces tecum directed personally to an individual not shown to be an officer or authorized agent of the corporation. The *Brussel* case, which conflicts with the holding below and requires proof that the party summoned is an officer or authorized agent, is now officially reported. *In re October 1969 Grand Jury, (Karl Brussel, Witness)*, 435 F. 2d 350 (7th Cir. 1970).

The IRS summons was not issued to and served upon petitioner as custodian of the books and records of the sixteen corporations, and it is not true that there was "a specific finding that petitioner had custody or control of the requested records." (Respondents' Brief, pp. 2, 5) Instead, the District Court merely made the alternative, conclusory "finding" that petitioner either has custody and control or has knowledge of the existence, non-existence, or whereabouts of the records. (Pet App. 12a) This was tantamount to no finding at all as to a crucial issue in the case.

Although the District Court ordered petitioner to produce all books and records of the sixteen corporations for all of the years specified in the summons, the respondents now contend merely that petitioner was "able to produce many of the records called for in the summons" and that petitioner failed to show that he "did not have the power to produce at least some of the records involved." (Brief, pp. 4-5; Emphasis added) This is a tacit concession that the District Court erred in entering its broad, unqualified enforcement order. Moreover, the respondents in effect concede that the trial court erred in ordering petitioner to produce the records of the five corporations now owned by a subsidiary of Chadbourn Inc.

The equivocal, alternative finding by the District Court, coupled with the respondents' concessions, compels the conclusion that both the summons and the enforcement order are at least bad in part. In *Bowman Dairy Co. v. United States*, 341 U.S. 214, 221 (1951), this Court declared that a party "should not be held in contempt under a subpoena that is part good and part bad" and that it is not incumbent "upon the person who faces punishment to cull the good from the bad."

Respondents dismiss the constitutional issue raised by petitioner with the assertion that the custodian of corporate records may not refuse compliance with a summons. (Brief, p. 5) It was not established, however, that petitioner was the custodian of the records of any of the corporations. Moreover, petitioner's argument was not based upon anticipatory Fifth Amendment claims, as the respondents' brief implies. Respondents

have made no attempt to reply to the contentions raised in the petition for certiorari.

For the foregoing reasons, and those previously advanced, the Court should grant the petition for certiorari.

Respectfully submitted,

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